STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 18, 1996

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William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M St., N.W. Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-128; FCC 96-388;
CC Docket No. 91-35

Gentlemen:

Please find enclosed for filing an original plus fourteen copies of the PETITION FOR RECONSIDERATION BY THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE REPORT AND ORDER in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed postage pre-paid envelope.

Yours truly,

Patrick S. Berdge
Attorney for California

MMA:mbh

Enclosures (17)

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	FCC Docket No. 96-388
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation	)	CC Docket. No. 91-35
	)	
Petition of the Public Telephone Council to Treat Bell Operating Company Payphones as Customer Premises Equipment	)	
	)	
Petition of Oncor Communications Requesting Compensation for Competitive Payphone Premises Owners and Presubscribed Operator Services Providers	)	
	)	
Petition of the California Payphone Association to Amend and Clarify Section 68.2(a)of the Commission's Rules	)	
	)	
Amendment of Section 69.2(m) and (ee) of the Commission's Rules to Include Independent Public Payphones Within the "Public Telephone" Exemption from End User Common Line Access Charges	)	

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PETITION FOR RECONSIDERATION BY
THE PEOPLE OF THE STATE OF CALIFORNIA AND THE
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

I. INTRODUCTION

Pursuant to Section 1.429 of the Federal Communications Commission ("FCC") Rules, the California Public Utilities Commission ("CPUC") hereby submits its Petition for Reconsideration of the FCC's Report and Order adopted September 20, 1996, in the above-captioned proceeding. The CPUC, which has general regulatory authority over telecommunications utilities in California, respectfully requests the FCC to reconsider certain key aspects of the Report and Order. We appreciate the FCC's recognition of the efficacy of California's payphone policies and citing it as an example that can be emulated by other states. However, we do have some concerns and respectfully request that the FCC reconsider its Report and Order. We therefore file this petition.

II. IT IS UNNECESSARY FOR THE FCC TO PREEMPT STATE REGULATION OF PAYPHONES.

The CPUC asks the FCC to reconsider its decision to preempt intrastate rate-making authority over payphone rates. Section 276 of the Telecommunications Act of 1996 ("the 1996 Act") charges the FCC with promoting open competition and the widespread deployment of payphone services. Toward that end, the FCC is required to ensure fair compensation for all calls and to eliminate subsidies. However, these goals can be accomplished without the wholesale preemption of state jurisdiction over intrastate rate-making in contravention of Section 2(b) of the Communications Act of 1934 ("the 1934 Act"). Section 2(b) makes clear that absent an express grant of authority, states retain intrastate rate-making authority. Determining compensation rates for intrastate payphone calls is best left to the states.

III. PREEMPTION MAY INTERFERE WITH THE PROPER EXERCISE OF THE STATES' POLICE POWERS

The Report and Order, in its effect, arbitrarily removes certain police powers from states seeking to curtail the use of public payphones for criminal and other illicit purposes. Local police and city governments have complained to the CPUC about illegal activities in certain inner-city locations where payphones attract criminal activity and have sought to remove or limit installation in extreme cases. If this action is construed as a barrier to entry, the Report and Order would prohibit state and local government from taking action necessary to protect public safety. Local jurisdictions should be able to exercise police powers, e.g., zoning restrictions, in order to remove payphones used in illegal activities.

The Report and Order ties the hands of local law enforcement and public officials who seek to provide for the health, safety and welfare of the community at-large by forbidding them from removing or limiting the placement of payphones in areas where illicit activities are facilitated by the presence of payphones. State and local governments need flexibility in payphone policy to ensure that payphones are available to the public on other than a "public policy" basis. Public policy payphones are defined very strictly as those which are placed in areas where a payphone might not otherwise be located to serve public health, safety and welfare goals, and number only about 2,000 in California.

IV. THE FCC'S REPORT AND ORDER FAILS TO PROVIDE FOR CONSUMER PROTECTIONS

The CPUC's program for oversight of payphone services is known as the Coin Operated Pay Telephone ("COPT") Enforcement Program. The COPT is responsible for oversight and compliance with LEC tariffs as well as for education of payphone service providers ("PSPs") and consumers. The CPUC has carefully balanced the interests of PSPs and the providers of local, intraLATA and interLATA service, to limit anti-competitive behavior. The CPUC has instituted customer safeguard programs to enforce rules concerning pricing and service issues. As potential barriers to entry, these safeguards would be invalidated by the Report and Order. Unfortunately, the Report and Order provides no comparable safeguards of its own.

V. THE REPORT AND ORDER MAKES NO SHOWING THAT MARKET FORCES CAN DEVELOP FAIR AND REASONABLE PAYPHONE RATES OR CONSUMER PROTECTIONS

The Report and Order looks to market forces to set payphone coin rates and eventually all non-coin call rates as well, but there is no showing that market forces can develop fair and reasonable rates. It maintains that once competitive market conditions exist, "the market [will] set the price for individual calls" from payphones (Report and Order (R&O), ¶ 49). This assertion is made on the basis of four states whose experience with a deregulated payphone industry has produced a 35 cent per-call local coin rate. The conditions of the market and the needs of consumers, we believe, are markedly different in California. Therefore, the evidence drawn from a limited sampling of four states should not be translated into national policy that is then imposed on entirely different market economies.

Moreover, the Report and Order's assertion that fully competitive conditions will automatically develop within 12 months of the Report and Order is inconsistent with the FCC's recognition that competition will take some time to generate. (R&O, ¶¶ 50 and 59.) Additionally, we are troubled by the assertion that "ease of entry and exit in this market will foster competition and allow the market, rather than regulation, to dictate the behavior of the various parties in the payphone industry." (R&O, ¶ 60.) There is no empirical evidence to support this contention.

VI. MARKET FORCES CANNOT ENSURE PLACEMENT OF PAYPHONES TO SERVE GENERAL PUBLIC NEEDS

In order to allow for the uninhibited entry into and exit from the payphone market, the Report and Order directs all state commissions to eliminate any regulations which might restrict full competition. (R&O, ¶ 160.) At the same time, however, the FCC acknowledges that market forces in and of themselves may not result in a market-based compensation rate, and the placement of payphones in areas where they may not be self-supporting (R&O, ¶ 13). If an area is not served with payphones because PSPs can't make a profit there, the public may suffer. The CPUC should have the authority to require the placement of payphones in densely populated urban areas where persons would otherwise have no recourse to private, or even public policy payphones, at a reasonable cost. The FCC's Report and Order would limit the states' ability to provide for the welfare of their residents.

VII. THE REPORT AND ORDER CREATES A SYSTEM OF SINGLE-OWNER MONOPOLIES

In seeking to create competition among PSPs, the Report and Order creates the potential for a system of unregulated and unfettered single-owner monopolies and fails to consider the potential monopoly power provided PSPs. While relying on unrestricted entry into the payphone market as a means of limiting prices, the Report and Order fails to address the issue of the exercise of monopoly power at local payphone sites with respect to individual consumers. Without specified consumer protections, the price of a payphone call at some locations may be as high as the PSP believes the market will bear. If location providers contract with a particular PSP rather than negotiate for lower prices with several PSPs, the consumer will have no choice in alternate PSPs.

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VIII. CONCLUSION

For all of the above reasons, the CPUC respectfully requests the FCC to reconsider its Report and Order in this proceeding.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
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